

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2016AP1054

Cir. Ct. No. 2011CF5433

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES D. CARTER,

DEFENDANT-APPELLANT,

APPEAL from a judgment and an order of the circuit court for Milwaukee County: CHARLES F. KAHN, JR. and FREDRICK C. ROSA, Judges. *Affirmed.*

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 DUGAN, J. James D. Carter appeals the judgment convicting him of the following sixteen counts: (1) armed robbery with threat of force (count one); (2) possession of a firearm by a felon (counts two, four, and five); (3) burglary (count three); (4) forgery by possession with intent to utter (counts ten and eleven); (5) forgery by uttering (counts thirteen, fifteen, seventeen, and

nineteen); (6) attempted theft by false representation (count twelve); and (7) theft by false representation (counts fourteen, sixteen, eighteen, and twenty).¹ He also appeals the postconviction court's denial of his postconviction motion.

¶2 Carter contends that the trial court erred in three respects: (1) count three, the burglary charge, was improperly joined with the other counts; (2) count five, the felon in possession of the firearm charge involving the assault-style rifle (assault-style rifle charge), should have been severed from the other counts against him because it caused unfair prejudice; and (3) there was insufficient evidence to support the conviction on the assault-style rifle charge. He also maintains that trial counsel failed to provide effective assistance for two reasons: (1) the severance motion pertaining to the burglary charge did not challenge joinder of that count, which prevented Carter from testifying on that charge; and (2) trial counsel did not file any severance motion pertaining to the assault-style rifle charge. We disagree and affirm.

BACKGROUND

¶3 We briefly outline the background facts and refer to additional facts as needed in the discussion that follows.

Initial Charges

¶4 In December 2011, Carter was charged in an information with burglary (count one), armed robbery with threat of force (count two), and

¹ The Honorable Charles F. Kahn, Jr., presided over the trial. The Honorable Fredrick C. Rosa entered the order denying the postconviction motion. For clarity, this opinion will refer to Judge Kahn as the trial court and Judge Rosa as the postconviction court.

possession of a firearm by a felon (count three). Citing WIS. STAT. § 971.12(2) and (3) (2011-12),² trial counsel filed a motion to sever the burglary charge to avoid undue prejudice to Carter, but did not assert that the burglary charge was improperly joined with the two other counts.

Amended Charges

¶5 On April 5, 2012, the State issued a twenty count amended information charging Carter with the following offenses:

- an October 11, 2011 armed robbery with threat of force (count one);
- an October 11, 2011 felon in possession of a firearm (count two);
- a June 8, 2011 burglary (count three);
- six November 4, 2011 felon in possession of a firearm (counts four through nine);
- a November 4, 2011 forgery with intent to utter (count ten);
- a November 4, 2011 forgery with intent to utter (count eleven);
- a November 4, 2011 attempted theft by fraud (count twelve);
- an October 21, 2011 forgery with intent to utter (count thirteen);
- an October 21, 2011 theft by fraud (count fourteen);

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

- an October 28, 2011 forgery with intent to utter (count fifteen);
- an October 28, 2011 theft by fraud (count sixteen);
- an October 28, 2011 forgery with intent to utter (count seventeen);
- an October 28, 2011 theft by fraud (count eighteen);
- an October 30, 2011 forgery with intent to utter (count nineteen);
- an October 30, 2011 theft by fraud (count twenty);

Trial Court Denies Motion to Sever Burglary Counts

¶6 On May 11, 2012, the trial court held a hearing on Carter’s motion to sever the burglary count. After listening to the parties’ arguments, the trial court denied the motion in an oral decision.

Jury Trial

¶7 On May 22, 2012, the parties entered into a stipulation that Carter had been previously convicted of a felony and was prohibited from possessing a firearm.

¶8 A four-day jury trial on the twenty charges against Carter began on May 22, 2012. The State’s opening statement told the jury that many of the charges against Carter were very similar and pertained to a “scam” Carter was running where he would respond to online classified advertisements for electronics on a website (Craiglist.org), contact the seller using the same cell phone each time, establish a purchase price with the seller, arrange to meet the seller at a location, and provide the seller with counterfeit bills in exchange for the electronic equipment. The State said that often Carter would give the counterfeit money to

the seller in an envelope and, most of the time, depart before the seller realized the money was counterfeit and contacted the police. The State then outlined the facts pertaining to each of the counts.

¶9 Each crime victim testified. After each victim testified, investigating law enforcement personnel testified with respect to that specific crime. The jury also heard testimony from an officer who analyzed the counterfeit bills and found a duplicate serial number that would not be found in genuine bills, an officer who conducted a November 10, 2011, lineup with three victims involved in electronic equipment transactions, during which two victims identified Carter as the perpetrator.

¶10 The State's electronic equipment transaction witnesses included the seller and her spouse, D.C. and J.V., respectively, who were involved in the October 10, 2011 armed robbery (counts one and two). After realizing the money was counterfeit, D.C. chased the perpetrator. As they were running, the perpetrator said, "if you don't stop following me, I am going to shoot you," and he reached back for something. D.C. saw a holster and the black butt of a gun.

¶11 With respect to the June 8, 2011 burglary charge (count three), which involved the theft of an automated teller machine (ATM) from a grocery store, the State called the store owner to testify. Then it called the investigating officer who took plastic bags from that scene. The State also called the officers who analyzed that evidence for fingerprints. It also called the officer to whom the grocer provided serial numbers of the stolen ATM, the officer who later analyzed the fingerprints from plastic that covered the stolen ATM when it was found in Carter's garage during the November 4, 2011 execution of a search warrant, and the officer who oversaw the execution of that search warrant.

¶12 The State also called witnesses to testify about who lived at the Sherman Boulevard residence: (1) a police officer who testified that Tenesha Carter,³ who leased the premises, told the officer that Carter and her sister lived at the residence with her; (2) a detective who conducted surveillance of the Sherman Boulevard residence and testified that he saw Carter coming and going from the residence; and (3) a police officer who said Tenesha told the officer that Carter either slept in the residence's basement or the northwest bedroom located on the first floor.

¶13 The officers testified about Carter's arrest on November 4, 2011, at a location near 53rd and Capitol where he had arranged an electronic equipment transaction. Carter was wearing a T-shirt that an arresting officer testified matched the T-shirt worn by the perpetrator shown in a surveillance video that had captured part of the armed robbery. Upon searching Carter, officers found counterfeit currency in a bank envelope and a cell phone that they knew had been used in five of the electronic equipment transactions.

¶14 That night after Carter's arrest, police executed the search warrant for the Sherman Boulevard property. Evidence of each of the crimes that Carter was charged with was found in that single search.

¶15 The defense called six witnesses: two officers who interviewed the armed robbery victim D.C.; an investigator; the owner of a residence that D.C. told police that she saw the armed robber flee into; Tenesha; and Carter's

³ For the sake of clarity, this opinion refers to Carter's sister by her given name.

girlfriend. Tenesha testified that she was aware that her deceased step-father's firearms, retained by her mother as a keepsake, were in the house.

¶16 In closings, trial counsel conceded that Carter had counterfeit money and that he was identified in some of the electronic equipment transactions. However, the theory of the defense was that Carter did not use or possess guns and he did not live at the Sherman Boulevard residence.

¶17 At the close of the trial, the court instructed the jury as to the elements of each crime charged in the individual counts, and that the State bore the burden of proving each element of each offense beyond a reasonable doubt. The trial court also told the jury that it must consider each count separately, and “must make a finding as to each count of the Information. Each one charges a separate crime, and you must consider each one separately. Your verdict for the crime charged in one count must not affect your verdict on any other count.”

Conviction and Sentence

¶18 Carter was convicted of all but four counts of possession of a firearm by a felon (counts six through nine). Those four counts were the counts related to the firearms that Tenesha testified were her mother's keepsakes.

¶19 The trial court sentenced Carter and judgments of conviction were entered on July 23, 2012. Later, for reasons not relevant to this appeal, pursuant to the trial court's orders, these judgments were subsequently amended, culminating with amended judgments entered on January 11, 2013.

Postconviction Motion

¶20 On December 29, 2015, Carter filed a postconviction motion requesting that the postconviction court vacate the judgment of conviction, dismiss count five (assault-style rifle charge), and grant him a new trial on the remaining counts. Carter argued that (1) the evidence was insufficient to support the conviction on count five, (2) count three (burglary) was improperly joined with the other counts, (3) the trial court erred in denying the motion to sever count three, and (4) count five should have been severed. Carter also contended that trial counsel provided ineffective assistance because (1) counsel did not challenge the joinder of count three with the other charges under WIS. STAT. § 971.12(1) and did not seek severance of that count based on his desire to testify, and (2) did not file a motion for severance of count five based on unfair prejudice and his desire to testify on count five. Carter requested a *Machner* hearing on the ineffective assistance of counsel issue.⁴

¶21 The postconviction court denied the motion without a hearing and this appeal followed.

DISCUSSION

I. The Burglary Charge was Properly Joined in this Action.

¶22 At the outset, we note that Carter first argues that the burglary charge was improperly joined with the other charges in this action. However, he acknowledges that trial counsel did not assert that the burglary charge was

⁴ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

improperly joined under WIS. STAT. § 971.12(1) and notes that the argument may be considered waived. Therefore, he argues alternatively that trial counsel was ineffective in not asserting that the burglary was improperly joined. On the other hand, the State does not assert that Carter forfeited his right to object to the joinder, but merely addresses whether trial counsel was ineffective in not objecting to joinder.

¶23 Because we do not find waiver and instead reach the issue of proper joinder and conclude that the burglary charge was properly joined, we reject Carter's ineffective assistance argument. Trial counsel is not ineffective for failing to make an objection that will be overruled. See *State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

¶24 Additionally, we note that Carter concedes that all the other charges were properly joined together and that only the burglary charge was improperly joined:

[C]ount [five] was properly initially joined in a complaint with the others under WIS. STAT. § 971.12(1). It was a charge of possession of a firearm by a felon, like the charge in counts [two] and [four] (which were properly joined to the other charges as being part of a common scheme or plan with the armed robbery, which was part of a common scheme with the fraud-related charges). Further, the felon in possession charge in count [five] and the other counts occurred within a short period of time, and evidence of the charges overlapped (since presumably the officers would have had to discuss the fraud scheme in order to explain why the presence of the counterfeit currency in the same room as the firearm was significant.)

A. Standard of Review

¶25 We first address whether joinder of the burglary charge with the other nineteen charges was proper under WIS. STAT. § 971.12(1). Carter

acknowledges that trial counsel moved to sever the burglary charge, but he notes that trial counsel's motion was limited to the argument that the joinder of the charges was unfairly prejudicial and that severance should be granted under WIS. STAT. 971.12(3). On appeal, Carter is not arguing that the trial court's denial of the motion to sever the burglary charge was erroneous. His argument is limited to his assertion that the burglary charge was improperly joined at the outset under § 971.12(1).⁵ Therefore, our analysis of this issue is limited to whether joinder was proper.

¶26 In *State v. Salinas*, 2016 WI 44, ¶30, 369 Wis. 2d 9, 879 N.W.2d 609, the Wisconsin Supreme Court stated that “[w]hether the initial joinder was proper is a question of law that we review without deference to the trial court, and the joinder statute is to be construed broadly in favor of the initial joinder.” *Id.* (citation omitted). Our review is therefore *de novo*.

B. Under the *Salinas* Factors, Joinder was Proper.

¶27 WISCONSIN STAT. § 971.12(1) controls the joinder of crimes. It allows two or more crimes to be charged in the same complaint or information if they “are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together or constituting parts of a common scheme or plan.” *Id.* Wisconsin courts favor

⁵ We do not address Carter's argument regarding his desire to testify on the burglary count which he presents as a part of his misjoinder argument because Carter concedes that when charges are properly joined, a defendant's wish to assert his Fifth Amendment right as to one while testifying regarding another is not a sufficient basis to object to joinder. See *State v. Hamm*, 146 Wis. 2d 130, 140, 430 N.W.2d 584 (Ct. App. 1988). Therefore, his desire to testify argument is only relevant under a harmless error analysis, if this court found that the charges were not properly joined in the first instance, which we do not.

initial joinder, particularly when the charged offenses involve the same defendant. *Salinas*, 369 Wis. 2d 9, ¶36. Initial joinder decisions are interpreted broadly “because of the goals and purposes of the joinder statute: (1) trial economy and convenience; (2) to promote efficiency in judicial administration; and (3) to eliminate multiple trials against the same defendant, which promotes fiscal responsibility.” *Id.*

¶28 In *Salinas*, the supreme court listed seven factors for courts to consider in deciding whether separate crimes are “connected together” for purposes of initial joinder, including but not limited to: (1) are the charges closely related; (2) are there common factors of substantial importance; (3) did one charge arise out of the investigation of the other; (4) are the crimes close in time or close in location, or do the crimes involve the same victims; (5) are the crimes similar in manner, scheme or plan; (6) was one crime committed to prevent punishment for another; and (7) would joinder serve the goals and purposes of WIS. STAT. § 971.12. *Salinas*, 369 Wis. 2d 9, ¶43.

¶29 Carter asserts that the burglary charge was not “of the same or similar character” as any of the other charges and further contends that there was no transactional or common scheme connected with the other offenses. Relying on the *Salinas* factors, the State counters that Carter’s case involves two or more transactions “connected together.” We agree that the burglary count was “connected together” with the other offenses. *See id.*, ¶30.

¶30 Several *Salinas* factors establish that the burglary and the other charges are connected together. *See id.*, ¶43. The ATM and plastic covering it were found in Carter’s garage. During the same search, law enforcement officers found (1) electronic equipment and some boxes from the electronic equipment that

Carter obtained through the electronic equipment transactions, (2) counterfeit currency that was the core of those transactions; (3) bank envelopes, which Carter had used in some of those transactions when transferring the counterfeit bills to the seller; (4) items with Carter's name in the basement and northwest bedroom; and (5) other evidence that linked Carter to the crimes. Officers also found six guns in the residence: (1) three rifles and an antique handgun were found in a first-floor closet farthest from the entryway (these guns were also described being located in the northeast bedroom); (2) a black .45 caliber semiautomatic pistol in a black nylon holster was found between the cushions of a couch in the basement; and (3) an assault-style rifle was found behind the northwest bedroom door partially in a plastic bag. The discovery of all the evidence in a single location during an investigative search forged a close relationship between the burglary and each of the other charged crimes.

¶31 Carter states that he found “no support for the proposition that joinder is appropriate merely because evidence of multiple dissimilar offenses was discovered during the same search.” However, as is evident from our analysis, we are not merely relying on the fact that the evidence was found during the same search. Our analysis incorporates other factors set forth in *Salinas* as well. *See id.*

¶32 We find that the second factor, the presence of common factors of substantial importance, is present. *See id.* The execution of the search warrant at Carter's residence resulted in the seizure of items having great evidentiary value, including identity, for each charge against Carter. In addition to the ATM from the burglary being found in Carter's garage, his fingerprints were found on the plastic covering the ATM. Those prints matched the prints found at the store where the ATM was stolen. In addition to the ATM, various items relating to the electronic equipment transaction charges were found in Carter's residence. There

were five incidents involving those electronic equipment transactions and evidence with serial numbers linking to four out of five of those completed transactions was found in the residence and for the fifth item, the victim was not able to provide a serial number, but the police found an item matching the exact description of the ASUS tablet. This evidence is probative in identifying Carter as being involved in both the forgeries and the burglary. The evidence found in Carter's residence involves common factors of substantial importance in identifying Carter as the person who committed all the crimes.

¶33 The third factor, whether one charge arose out of the investigation of another, is also present. *See id.* In this instance, the burglary charge arose out of the investigation of the electronic equipment transaction offenses. The ATM taken during the burglary and the plastic over the ATM that had Carter's fingerprints on it were found at Carter's Sherman Boulevard residence during the execution of the search warrant for evidence of the electronic equipment transactions. This factor also supports the initial joinder.

¶34 With respect to the fourth factor, the crimes were close in location and in time; they occurred within northern Milwaukee County over a five-month period. *See State v. Hall*, 103 Wis. 2d 125, 139, 307 N.W.2d 289 (1981) (regarding location).

¶35 Furthermore, with respect to the seventh factor, joinder would serve the goals and purposes of WIS. STAT. § 971.12 of trial economy and convenience, promoting efficiency in judicial administration and eliminating multiple trials against the same defendant. *See Salinas*, 369 Wis. 2d 9, ¶43. Combining the burglary charge with the other charges for a single trial conserved court time, allowed for the selection of a single jury and a single gathering of witnesses, and

saved additional financial expenses that would have been incurred by multiple trials. *See id.*

¶36 This court concludes that because the burglary charge was “connected together” with the other charges against Carter, it was properly joined with the charges for a single trial. *See id.*, ¶42.⁶ For the above reasons we find that joinder of the burglary charge with the other charges was proper under WIS. STAT. § 971.12(1).

II. Carter has Not Established Substantial Prejudice Because the Assault-Style Rifle Charge was Tried with the Other Charges.

¶37 With respect to the possession of the assault-style rifle charge (“count five”), it should be noted at the outset that Carter concedes that it was properly joined with all the other counts, except the burglary charge. Thus, his arguments are limited to unfair prejudice.

¶38 Carter lists two issues regarding count five: (1) whether joinder of count five with the other counts caused unfair prejudice such that the counts should have been severed; and (2) whether trial counsel provided ineffective assistance when counsel failed to move to sever. The State responds that Carter suffered no actual prejudice from count five being tried with the other charges. Again, the State does not assert that Carter forfeited his right to move for severance. Because we do not find waiver and instead address Carter’s arguments

⁶ Because we find that the burglary charge was properly joined in the information we need not address Carter’s harmless error argument. *See State v. Leach*, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). Also, because we do not find waiver and instead reach the issue of proper joinder and conclude that the burglary charge was properly joined, we reject Carter’s ineffective assistance argument. Trial counsel is not ineffective for failing to make an objection that will be overruled. *See State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

regarding severance and find that he has not established substantial prejudice by the trial of assault-style rifle charge with the other charges, we reject Carter’s ineffective assistance argument. Trial counsel is not ineffective for failing to make an objection that will be overruled. *See Harvey*, 139 Wis. 2d at 380.

A. Standard of Review

¶39 A trial court’s decision on a motion to sever under WIS. STAT. § 971.12(3) is discretionary. *Salinas*, 369 Wis. 2d 9, ¶30. This court will affirm the decision if the trial court examined the relevant facts, applied a proper legal standard, and used a rational process to reach a conclusion that a reasonable court could reach. *See Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). In this instance, we apply the standard to the postconviction court’s determination because the trial court was not presented with the issue, and the State has not asserted the issue was forfeited.

B. Carter has not Established that Substantial Prejudice Resulted Because Count Five was Tried with the Other Counts.

¶40 Severance is governed by WIS. STAT. § 971.12(3), which allows a trial court to order separate trials “[i]f it appears that a defendant or the [S]tate is prejudiced by a joinder of crimes[.]”

When a defendant moves to sever, the trial court must determine what, if any, prejudice would result from a trial on the joined offenses and weigh that potential prejudice against the interests of the public in conducting a trial on the multiple counts. In order to establish that the trial court erroneously exercised its discretion, the defendant must establish that he or she suffered substantial prejudice.

State v. Linton, 2010 WI App 129, ¶15, 329 Wis. 2d 687, 791 N.W.2d 222 (citations, quotation marks, and internal editing omitted).

¶41 In asserting prejudice, Carter contends: (1) “the bombardment of the jury with the evidence relating to the other nineteen unrelated criminal counts” including possession of the handgun and armed robbery, likely contributed substantially to the conviction on count five; (2) there is a substantial danger that the evidence that he possessed an assault-style rifle contributed to his conviction on the armed robbery charge; and (3) he would have testified at a separate trial on count five denying that he stayed in the bedroom where the gun was found.

¶42 We find that Carter has not established prejudice, much less substantial prejudice. With respect to Carter’s first argument, the rifle was found unloaded and in a partially open plastic bag. Furthermore, the evidence regarding the assault-style rifle charge was clear and distinct from that of the other charges, as will be discussed in further detail with respect to Carter’s challenge to the sufficiency of the evidence in the proof of that offense. Moreover, the jury was properly instructed on the consideration of individual charges, *see State v. Hoffman*, 106 Wis. 2d 185, 213, 316 N.W.2d 143 (Ct. App. 1982), and demonstrated that it followed those instructions by acquitting Carter of four firearm charges.

¶43 With respect to Carter’s second argument that an allegation of possession of “an extremely dangerous assault-style rifle ... carries extremely inflammatory implications,” and extrapolates there is a very real likelihood that this allegation contributed to the jury’s willingness to find Carter guilty of armed robbery, Carter cites no legal authority in support of his contention. It is not this court’s role to develop arguments for a party. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (courts may not act as advocates; inadequately briefed arguments may be ignored). Additionally, Carter’s assertion

is not accompanied by any citation to the record. *See id.* at 646. Carter’s second argument also ignores the strength of the armed robbery evidence.

¶44 Additionally, review of the record provides no factual support for any inflammatory implication for the assault-style rifle. The testimony regarding objects found during the search was provided without embellishment or hyperbole. The officer who oversaw the search warrant’s execution testified about what objects were found and where they were found in the residence, without additional commentary. As previously noted, the evidence reflects that the rifle was unloaded and in a partially open plastic bag—hardly a threatening image.

¶45 Moreover, because Carter has conceded that joinder of count five is proper, it is presumed that Carter will suffer no prejudice due to a joint trial. *See State v. Leach*, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). Carter has not rebutted that presumption. *See id.*

¶46 With respect to Carter’s third argument that he would have testified at a separate trial of count five, Carter concedes that a desire to testify on the assault-style rifle charge would not have been sufficient to require severance, citing *State v. Hamm*, 146 Wis. 2d 130, 140, 430 N.W.2d 584 (Ct. App. 1988). Yet, he maintains, without citation to any legal authority, it is an example of the prejudice that flowed from trial counsel’s failure to move for severance.

¶47 However, when a defendant seeks severance based on a desire to testify on one count and remain silent on others, the court balances “the public interest in joint trials against a claim of possible prejudice to a defendant, [and] something more is needed than defendant’s statement that he intends to testify on one charge and not on the other.” *Holmes v. State*, 63 Wis. 2d 389, 398, 217 N.W.2d 657 (1974). In order to obtain severance based on a desire to testify, a

defendant must demonstrate that he has important testimony to present on the count or counts and a strong reason to refrain from testifying on the other counts. *See State v. Nelson*, 146 Wis. 2d 442, 457-58, 432 N.W.2d 115 (Ct. App. 1988).

¶48 Carter has fallen far short of demonstrating possible prejudice—he has not shown the importance of his proposed testimony on count five and he has not stated any reason, let alone a strong reason, to refrain from testifying on the other counts as required in *Nelson*. In this case, Carter put on the scales only his desire to testify on this charge and a generalized and conclusory statement that his testimony was significant but does not offer any explanation why his testimony on any of the other charges would be highly prejudicial. *See Holmes*, 63 Wis. 2d at 398. As noted in *Holmes*, “[i]f no more than that were required, control as to consolidation or severance of charges would clearly pass out of the hands of the trial court and into the complete control of the defendant.” *Id.* at 398-99.

¶49 Additionally, Carter provides no indication that he informed trial counsel of his purported desire to testify on count five. Trial counsel cannot pursue an issue that Carter knew about but chose not to tell trial counsel. *See State v. Eison*, 2011 WI App 52, ¶21, 332 Wis. 2d 331, 797 N.W.2d 890. Moreover, Carter had an opportunity to tell the trial court that he wanted to testify. The trial court asked Carter whether he wanted to testify, emphasizing that it was Carter’s decision. Carter stated that he invoked his right not to testify, that he had decided not testify on his own and that he had discussed it with trial counsel.

¶50 Furthermore, as the postconviction court held, “there is not a chance that [the trial court] would have granted [severance] under the totality of the circumstances presented.”

¶51 Based on the foregoing, Carter has not established substantial prejudice as required to obtain severance. *See Linton*, 329 Wis. 2d 687, ¶15. We agree with the postconviction court that Carter did not establish a basis for severance of count five. Thus, as previously stated, Carter cannot establish that he was prejudiced by the absence of a motion for severance of the charge. *See State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). Having so concluded, we reject Carter’s ineffective assistance argument. Trial counsel is not ineffective for failing to make an objection that will be overruled. *See Harvey*, 139 Wis. 2d at 380.

III. Sufficient Evidence Supports the Guilty Verdict on the Assault-Style Rifle Charge of Count Five.

¶52 Carter contends that the evidence on the assault-style rifle charge was not sufficient to support his conviction beyond a reasonable doubt, contending that although the jury could infer that Carter had been in the northwest bedroom recently, there was no evidence that Carter knew about, let alone had actual physical control of, the rifle at any time.

¶53 We apply the following well-established standard to Carter’s contention regarding the sufficiency of the evidence:

[I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

See *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

¶54 The crime of felon in possession of a firearm has two elements: (1) the defendant has been convicted of a felony, and (2) the defendant possessed the firearm. *State v. Black*, 2001 WI 31, ¶18, 242 Wis. 2d 126, 624 N.W.2d 363. Possession includes both actual and constructive possession. *State v. Peete*, 185 Wis. 2d 4, 14-16, 517 N.W.2d 149 (1994). The trial court instructed the jury on both theories of possession.

¶55 Proof that Carter had actual physical control of the rifle would constitute possession. Proof of Carter’s joint dominion and control over the residence and the bedroom containing the rifle is also sufficient to establish his possession of the rifle. See *Ritacca v. Kenosha Cty. Court*, 91 Wis. 2d 72, 82, 280 N.W.2d 751 (1979). “Constructive possession” consists of “circumstances that are sufficient to support an inference that the person exercised control over, or intended to possess, the item in question.” WIS JI—CRIMINAL 920, Comment 2 (2000). See *State v. Allbaugh*, 148 Wis. 2d 807, 813-14, 436 N.W.2d 898 (Ct. App. 1989).

¶56 Carter stipulated that he had been convicted of a felony. Thus, the only issue for the jury was whether he possessed the assault-style rifle.

¶57 Viewing the evidence most favorably to the State and the conviction, the jury could reasonably conclude that Carter lived at the Sherman Boulevard property and stayed in the northwest bedroom where police found the rifle. Two days before the search, Tenesha told an officer that Carter lived there. According to the police officer who oversaw the execution of the search warrant, Tenesha told him that she lived at the Sherman Boulevard residence with her brother, the

defendant, and that he “either sleeps in the basement or the northwest bedroom located on the first floor.” During the search, police discovered the rifle in that bedroom. During the same search of the northwest bedroom, police discovered the multiple items bearing Carter’s name: (1) a pill bottle; (2) an identification card; (3) a MoneyGram sent to Carter at another address with a portion dated October 20, 2011, stating that the sender should be notified of Carter’s new address, at the Sherman Boulevard address; (4) a VISA card bearing Carter’s name; and (5) a movie theater ticket recently purchased with that card.

¶58 In addition to the items bearing Carter’s name found in the northwest bedroom, the police found counterfeit money—the indispensable part of Carter’s electronic equipment transactions—and a bank envelope from the same bank as those used in some of Carter’s electronic equipment transactions.

¶59 Furthermore, although Carter asserts that there was no evidence that he knew about the assault-style rifle, the jury heard police testimony that the rifle was behind the door of Carter’s bedroom, in the area between the door and the wall, and that it was only partially inside an open plastic bag.

¶60 From the evidence presented at trial, the jury could reasonably conclude that the northwest bedroom was Carter’s bedroom, and it could reasonably conclude that Carter possessed or constructively possessed all the items found in it, including the rifle.

¶61 This court must follow the inferences that support the jury’s verdict. *See Poellinger*, 153 Wis. 2d at 506-07. The evidence supports the reasonable inference that Carter had joint dominion and control over the residence, full dominion and control over the bedroom and its contents, and that he exercised control over the rifle—and intended to possess it. The jury could reasonably infer

that Carter saw the rifle each time he closed the bedroom door from the inside or looked behind the door. Because he would have to have recognized it as a rifle—which in Carter’s case, he could not lawfully possess—the evidence fully supports the inference he knew what he had done and acted intentionally in having the weapon and keeping it in his bedroom. Therefore, we agree with the postconviction court that the evidence supports the inferences drawn by the jury to support Carter’s conviction on the assault-style rifle charge. *See id.*

CONCLUSION

¶62 We conclude that the joinder of the burglary count was proper, and Carter has not demonstrated that the assault-style rifle count should have been severed due to substantial prejudice or his desire to testify on that count. Because the record conclusively demonstrates that Carter was not entitled to relief, it was within the postconviction court’s discretion to deny the motion without a hearing. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Furthermore, we conclude that sufficient evidence supports the jury’s guilty verdict on the assault-style rifle charge of count five.

¶63 For the reasons stated above, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

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